

Memorandum

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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

TO : Bryant VanBrakle

DATE: January 15, 2004

FROM : Commissioner Joseph E. Brennan

SUBJECT : Summary of Oral Presentation of National Industrial Transportation League re P3-03, P5-03, P7-03, P8-03, and P9-03

This summary of an oral presentation, which took place on January 14, 2004 at 9:00 AM at the Commission's offices at 800 North Capitol Street, NW, Washington, DC, is being submitted to the Secretary of the FMC for submission into the record of the above proceedings. Present for the Commission were Commissioner Joseph E. Brennan and Steven Najarian, Counsel to Commissioner Brennan. Present for the presenters were: Karyn A. Booth, Thompson Hine, LLP; Nicholas J. DiMichael, Thompson Hine, LLP; and Peter J. Gatti, Jr., Executive Vice President, National Industrial Transportation League. The presenters made the following points:

The exemption petitions of the NVOs are an issue of major importance to members of NITL. Shippers are the main constituency of NITL. Ocean transportation intermediaries and ocean common carriers are also part of the membership. The ocean common carriers may not necessarily endorse the petitions, but differing views are common within any trade association.

NITL was active in the passage of OSRA. Before OSRA, the Shipping Act was not responsive to how the industry worked and what the industry needed. The "me-too" rights of shippers and the full transparency of service contracting are examples. Businesses need confidentiality and the protection of proprietary information. The statute needed to be changed, and Congress did so at the request of shippers and carriers.

The FMC should respond to the needs of the maritime industry. The agency has the authority to give NVOs an exemption that allows NVOs to enter into confidential service contracts with their shipper customers. The petitions represent an opportunity to make GSRA work better by making it more responsive. There is no downside to granting an exemption.

The National Industrial Transportation League, along with the National Customs Brokers and Forwarders Association of America and the Transportation Intermediaries Association, have filed with the a FMC a joint statement as to what these organizations agreed on at a

minimum with regard to the NO exemption petitions. It is important to have as much commonality as possible in order to give the FMC some direction. The joint statement is being made by the major groups concerned with the exemption issue.

The **first** three points of the joint statement deal with the threshold question of the authority of the FMC to grant an exemption. OSRA eliminated two factors needed for the granting of an exemption. An exemption for **NVOs** would be pro-competitive, not anti-competitive. It would extend the **benefits** of confidential contracting. It would represent competition for the vessel-operating common carriers.

Other federal agencies such as the Surface Transportation Board have exercised their exemption authority as the FMC is now being requested to do. The FMC can look to the experience of these other agencies for a comparison. The maritime industry is unique in limiting the contract authority of intermediaries. Such limitations do not exist for air and ground transport.

The fourth point of the joint statement recommends that the FMC consolidate the petitions into one rulemaking. The **fifth**, sixth, and seventh points of the joint statement explain how the industry has changed since the implementation of OSRA.

Everyone agrees that OSRA benefitted the industry. As the FMC's study of OSRA found, the key to **OSRA's** success has been confidential contracting. An exemption for **NVOs** would continue that success. The spirit of OSRA was to show more deference to the marketplace. The requested exemption would expand to **NVOs** the marketplace business environment of OSRA. OSRA has not necessarily lowered prices for shippers. Prices fluctuate, because that is how the marketplace operates.

One change in the industry since 1998 is that shippers now demand more services of **NVOs**. Shippers want to sign customized, confidential contracts with **NVOs**. Following September 11, 2001, shippers often rely on **NVOs** for help with new Customs' rules.

NITL anticipates making a further filing before the close of the comment period, and individual shippers will probably also file comments. NITL will address the threshold issue of whether the FMC has the authority to grant the petitions. It will also discuss the policy question of how the FMC should best use that authority.

The FMC should **first** rule on the threshold question of whether the agency has the authority to grant an exemption. If the answer is yes, the Commission should then pursue a further rulemaking as to the form that an exemption should take. The exemption mechanism of section 16 is preferable to the arduous task of seeking an amendment of **OSRA** by Congress.